

Weiskopf

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-219418

FILE:

DATE: October 15, 1985

Starlite Services, Inc.

MATTER OF:

DIGEST:

1. Liquidated damages provisions for the defective performance of toilet room cleaning services, consisting of several tasks, are not invalid for failing to apportion the damages among the tasks where, to collect damages, the contracting officer's representative must determine that any deficiencies are of such proportion as to render the room unsuitable for the government's purpose.
2. Protester, incumbent contractor, has not shown that the contracting agency has a policy of administering valid liquidated damages provisions to penalize contractors, where the only evidence is the protester's self-serving allegation that the contracting officer's representative under the prior contract so administered the provisions. Moreover, how the representative actually administered the provisions is a matter of contract administration, not for GAO's review.
3. In solicitation for custodial services, the contracting agency reasonably may designate toilet room care, including both cleaning and basic servicing, as a single category for establishing liquidated damages. The government does not have the burden of setting forth a measure of damages for each required task to establish a valid system of liquidated damages.

Starlite Services, Inc., protests that invitation for bids No. GS-11C-50031, issued by the General Services Administration (GSA) to obtain custodial services at the John W. Powell Federal Building and Solid State Physics

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Laboratory, provides for liquidated damages for unsatisfactory performance that will unfairly penalize the contractor.

We dismiss the protest in part and deny it in part.

The protest involves provisions virtually identical to those already upheld by this Office in Environmental Aseptic Services Administration (EASA), 64 Comp. Gen. 54 (1984), 84-2 CPD ¶ 510, and Consolidated Maintenance Co., B-217140, Jan. 22, 1985, 85-1 CPD ¶ 84. The provisions basically authorize GSA to deduct a predetermined amount for an entire toilet room (here, \$1.24 per fixture in the room for each day of defective service during the first performance year) where the room is not satisfactorily cleaned, or policed and serviced, as determined by the contracting officer's representative. Since these provisions establish fixed amounts the government can recover upon proof of deficient performance, and without proof of the damages actually sustained, they are subject to the requirement in the Federal Acquisition Regulation (FAR) that the rate of such damages, termed liquidated damages, must be reasonable in light of the solicitation's requirements. FAR, 48 C.F.R. § 12.202(b) (1984). Liquidated damages fixed without any reasonable relationship to probable actual damages may be held to be a penalty and, therefore, to be unenforceable. See Priebe & Sons v. United States, 322 U.S. 407 (1947).

Starlite Services, like the protesters in the previous cases, argues that the provisions are unreasonable since they permit a deduction for an entire room for one deficiency, thus depriving the contractor of payment where the government obtains the benefit of partial or substantial satisfactory performance. In addition, Starlite Services argues that it is unreasonable and unfair to deduct the same amount for deficient policing and servicing (e.g., emptying trash receptacles and refilling dispensers of toilet paper, soap and paper towels) as for deficient cleaning since cleaning services require more time and are more costly.

We have held that liquidated damages are unreasonable where the solicitation provides for a deduction for an entire service consisting of several tasks (e.g., room cleaning services) based on the contractor's failure to perform satisfactorily only a portion of the tasks, if the nature of the deficiencies do not render the entire service

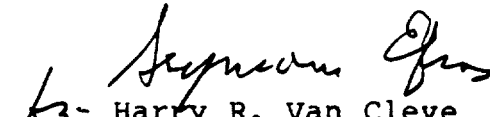
unsuitable for the government's purpose. EASA and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194. We also have held that the provisions challenged do not violate this rule. See EASA, 64 Comp. Gen. 54, supra; Consolidated Maintenance Co., B-217140, supra. That is because the provisions require that the contracting officer's representative or government inspector determine, before taking a deduction for the entire toilet room, that the deficiencies are of such proportion as to render the room unsuitable for the government's purpose. If the contracting agency administers the provision by taking deductions without regard to whether the deficiencies are of such proportion as to render the entire room unsuitable, that would involve a matter of contract administration, not for review by our Office. EASA, 64 Comp. Gen. 54, supra; United Food Services, Inc., B-215538, Oct. 23, 1984, 84-2 CPD ¶ 450.

Acknowledging these decisions, Starlite Services, the incumbent contractor, maintains that the contracting officer's representative under the prior contract administered similar provisions as requiring a deduction for any deficiency, regardless of how minor. The protester argues that this practice is indicative of GSA's policy, and that this policy thwarts the FAR's prohibition against unreasonable rates of liquidated damages. GSA responds that its policy is otherwise and points out that the form for recording inspections specifically states that if an area has minor deficiencies, but is satisfactory overall, the area should be rated satisfactory.

Even assuming that an agency's interpretation of, or policy of administering, otherwise valid liquidated damages provisions could provide a basis for our review, we believe that the protester has not met its burden of showing that GSA interprets the provisions or has a policy of administering them so as to take deductions for minor deficiencies. The protester only asserts that one particular contracting officer's representative so administers the provisions and asks us to infer from that self-serving allegation that GSA has a policy of administering the provisions to impose a penalty. The protester has the burden of proof, and unsupported self-serving statements do not meet that burden. Richard M. Walsh Associates, Inc., B-216730, May 31, 1985, 85-1 CPD ¶ 621. Furthermore, the issue of how the provisions were administered under the previous contract is, as stated above, a matter of contract administration that this Office does not review. EASA, 64 Comp. Gen. 54, supra; United Food Services, Inc., B-215538, supra. We therefore dismiss the protest as it relates to GSA's alleged failure to recognize partial or substantial performance.

We find no merit in the protester's second contention, that it is unfair to deduct the same amount for deficient servicing and policing of toilet rooms as for cleaning them. We point out that the solicitation treats the care of toilet rooms as one service, subsuming cleaning plus policing and servicing, for which deductions can be taken if the contractor's unsatisfactory performance renders the room unsuitable for the government's purpose. Given that the solicitation's scope of work involves approximately 853,000 square feet of space (including, among other things, lobbies, office space, storage space, garage space, and lavatories), we do not believe that designating toilet rooms as a single category for deductions is unreasonable. The government does not have to set forth in the solicitation a measure of damages for each divisible area or task in order to establish a valid system of liquidated damages. See EASA, B-218487, Aug. 16, 1985, 85-2 CPD ¶ 180. There is no requirement that a solicitation be so detailed as to eliminate all performance uncertainties or address every possible eventuality, and the fact that the resulting contract may impose some risk on the contractor does not render the solicitation improper. Richard M. Walsh Associates, B-216730, supra.

The protest is dismissed in part and denied in part.


for Harry R. Van Cleve
General Counsel